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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JOHN LEWIS TOLLIVER, Defendant and Appellant.	D073318 (Super. Ct. No. SCE370399)

APPEAL from a judgment of the Superior Court of San Diego County, Lantz Lewis, Judge. Reversed and remanded with directions.

Bruce L. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Kelley Johnson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant John Lewis Tolliver of resisting an executive officer with force, in violation of Penal Code section 69,[1] and of being under the influence of methamphetamine, in violation of Health and Safety Code section 11550. Prior to the verdicts, Tolliver pled guilty to failing to appear while on bail (§ 1320.5); admitted that he committed the offense while on bail pending final judgment on an earlier felony offense (§ 12022.1, subd. (b)); admitted two prior strikes (§§ 667, subds. (b)-(i), 668, 1170.12); and admitted a prison prior (§ 667.5, subd. (b)).

On appeal from the resulting judgment, Tolliver raises three arguments: (1) The appellate court should review the materials the trial court considered in camera in response to Tolliver's motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); (2) Tolliver's trial counsel failed to provide reasonably effective assistance by not, as part of the *Pitchess* motion, requesting information on excessive force committed by the deputy sheriffs who detained Tolliver; and (3) for purposes of the count for resisting an executive officer with force, the trial court erred by failing to instruct the jury on the lesser included offense of assault. As we will explain: (1) We do not reach the issue whether to review the materials produced in response to Tolliver's *Pitchess* motion, because the trial court erred in the procedure it employed in conducting the in camera review during the *Pitchess* proceedings; (2) Tolliver cannot establish prejudice by his trial attorney's failure to have requested information on excessive force as part of the *Pitchess* motion; and (3) Tolliver was not entitled to a jury instruction on assault, because

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1 Further unidentified "section" or "§" references are to the Penal Code.

by the time the deputy sheriffs committed what Tolliver suggests is excessive force, he already had completed the crime of resisting an executive officer with force.

Accordingly, we will reverse the judgment and remand the matter with directions that the trial court review in camera the previously produced records. If, following the in camera review, the trial court determines that discoverable information exists and should be disclosed, then the court must order disclosure, allow Tolliver an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability that the outcome would have been different had the discoverable information been disclosed prior to the underlying trial. If the court's in camera inspection on remand reveals no discoverable information (or the existence of discoverable information, but no prejudice from the prior denial of the discovery), then the court shall reinstate the judgment.

I. STATEMENT OF THE CASE

In a September 2017 information, the People alleged three counts against Tolliver: resisting an executive officer with force (§ 69; count 1); being under the influence of a controlled substance, i.e., methamphetamine (Health & Saf. Code, § 11550, subd. (a); count 2); and failure to appear while on bail (§ 1320.5; count 3). The People further alleged that, at the time of the failure to appear (count 3), Tolliver was on bail pending final judgment on an earlier felony offense (§ 12022.1, subd. (b)), and Tolliver suffered two strike priors (§§ 667, subds. (b)-(i), 668, 1170.12) and one prison prior (§ 667.5, subd. (b)).

Prior to trial, Tolliver filed a *Pitchess* motion to discover "evidence of and complaints of: (1) false arrests; (2) false statements in reports; (3) false claims of

probable cause; (4) false testimony; and (5) any other evidence of or complaints of dishonesty" by either San Diego County Deputy Sheriff F. or San Diego County Deputy Sheriff A. During the portion of the hearing open to the public, the trial court first denied defense counsel's oral motion to expand the scope of the motion to include discovery of "possible use of force or excessive force complaints against" Deputy F. or Deputy A. The court then granted in part the written motion, ruling that the court would conduct an in camera review as to the two deputies' "personnel files for complaints of false statements and reports, false testimony[,] and dishonesty [*sic*]." Following the in camera proceedings—attended by the court, the Sheriff's Department's custodian of records, and counsel for the Sheriff's Department (and a court reporter)—the court ruled that there were no responsive (i.e., discoverable) documents.

Weeks later, Tolliver pled guilty to the failure to appear while on bail (§ 1320.5; count 3) and admitted the enhancement of having committed the offense while on bail pending final judgment on an earlier felony offense (§ 12022.1, subd. (b)).

The case went to trial on the remaining counts. While the jury was deliberating on counts 1 and 2, Tolliver admitted the allegations of the two strike priors (§§ 667, subds. (b)-(i), 668, 1170.12) and the one prison prior (§ 667.5, subd. (b)). The jury convicted Tolliver of counts 1 and 2—i.e., resisting an executive officer with force (§ 69, subd. (a)), and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)).

The court sentenced Tolliver to state prison for a term of four years and imposed various fees, fines, and assessments. Tolliver timely appealed.

II. STATEMENT OF FACTS

Since the only fact-based substantive ruling in this opinion is whether the trial court erred in failing to instruct the jury on assault, *as a lesser included offense to resisting an executive officer with force*, we recite the evidence, as relied on by Tolliver in his appellate brief, in a light most favorable to Tolliver. (*People v. Woods* (2015) 241 Cal.App.4th 461, 475, 476 (*Woods*); *People v. Turk* (2008) 164 Cal.App.4th 1361, 1368, fn. 5.) This does not include discrediting or otherwise ignoring the uncontradicted evidence in support of the prosecution's case, and Tolliver does not contend otherwise.

On December 14, 2016, shortly before 3:30 a.m., partners Deputy F. and Deputy A. received a dispatch advising them of a series of 911 emergency telephone calls and hang-ups from a residence located at a specified address in Santee. The alert advised the deputies that the 911 operator could not identify the type of emergency involved—identifying it as " 'unknown trouble' "—either because the person calling in was unable to communicate the information or because the operator was too confused to understand what was being reported. The person calling in identified himself as " 'John' "; he sounded confused or paranoid, stating (somewhat inconsistently) that two vehicles were involved in some sort of an altercation, his girlfriend was hyperventilating from being stalked by an ex-boyfriend, and someone was locked in the trunk of a car; and he requested both law enforcement and paramedic assistance.

Deputy F. and Deputy A. went to the address, where, on a quiet street, they found a residence and through the window saw an older man sitting in the front room watching television. After verifying the address with their dispatch, the officers knocked on the

door. The older man, who had seen the officers when they looked into the window, answered the door and said " 'Here he is,' " pointing to Tolliver, who was standing behind him.

Tolliver walked forward, out of the front door and onto a small porch step at the entryway, between the officers and door, as the older man closed the door behind him. Each deputy was in official department-issued attire: a tan and green Sheriff's uniform containing the deputy's name followed by " 'Sheriff's Department' "; a duty belt that visibly held a firearm, baton, Taser, and set of handcuffs; and a radio attached to his shirt. In addition, the deputies had arrived in a marked black-and-white patrol vehicle, with overhead lights and a Sheriff's insignia on the side, that was parked in front of the house.

Both Deputy F. and Deputy A. had received formal training and had experience in recognizing and handling people who were under the influence of controlled substances, including methamphetamine. Upon seeing Tolliver, both deputies immediately recognized multiple symptoms that led them to conclude that Tolliver was under the influence of a controlled substance—likely methamphetamine. The deputies based their observation on Tolliver's behavior and appearance: Tolliver walked with a rigid muscle tone; he was drenched in sweat (at 3:30 a.m. on a Dec. morning); he was hallucinating; he was rambling incoherently; he was hyperactive; he appeared to be looking through the deputies with his eyes wide open; he seemed paranoid; and he held two telephones, one in each hand, which he inexplicably threw onto the front lawn.

Based on their training and experience, Deputy F. and Deputy A. knew that someone under the influence of methamphetamine can be "combative and

uncooperative," which easily can result in a "very explosive, dangerous situation"; people in that condition do not feel pain and, if excited, can have superhuman strength. Deputy F. believed that the best approach for safely getting the situation under control was to act calmly, gently, and slowly and to handcuff Tolliver.[2] Deputy F. decided on this approach for at least three reasons: (1) Because he and Deputy A. had witnessed enough signs and symptoms to recognize that Tolliver was under the influence of a controlled substance, Deputy F. wanted to effect a lawful detention; (2) the deputies did not yet know the nature of the 911 call and were concerned, in particular, that Tolliver might be armed or that there might be a pending emergency or completed crime (e.g., a kidnapping, based on the 911 report that someone was locked in the trunk); and (3) in just minutes, the situation had already reached a "dangerous" level.

Accordingly, with Tolliver on the step between the front door and where the two deputies were standing, Deputy F. explained to Tolliver who the two deputies were and that they were there to help him. In a "[v]ery calm but assertive" manner, Deputy F. let Tolliver know that he was not under arrest; rather, Deputy F. was going to detain Tolliver in handcuffs so that the deputies could gather information.

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[2] According to Deputy F., a deputy sheriff's "primary responsibility in any situation is to preserve life, protect life." Thus, as Deputy F. explained at trial, in responding to the 911 emergency call and observing Tolliver's behavior and demeanor, his (Deputy F.'s) decision to handcuff Tolliver was "[a]bsolutely" appropriate for reasons of safety. Tolliver does not argue otherwise on appeal. Tolliver was approximately the same height as Deputy F., but was heavier by at least 20 pounds; and Tolliver was four inches taller and weighed approximately 20 pounds more than Deputy A.

At the same time, Deputy F. slowly circled behind Tolliver (such that Deputy F., Tolliver, and Deputy A. were in a straight line between the front door and the sidewalk that led from the porch step to the street) and locked Tolliver's left wrist in a handcuff. Before Deputy F. was able to secure Tolliver's right wrist, however, Tolliver made "quick[]," "sudden[]," and "random[]" movements that resulted in Deputy F. being thrown into the front door and down onto the porch step—with Tolliver between Deputy F. and Deputy A., who was on the sidewalk or grass just off the step toward the street. As Deputy F. was knocked down, he was trying to hold onto Tolliver's left (cuffed) wrist and Tolliver's right (free) arm; Tolliver was thrashing his body and kicking; and, in response to Tolliver's actions, Deputy A. punched Tolliver in the face "probably four solid times."[3] With Tolliver "momentarily stunned," Deputy A. radioed for backup law enforcement and medical assistance.

The evidence is inconsistent as to exactly when—i.e., before or after the deputies' application of additional force—Deputy F. was able to cuff Tolliver's right wrist. In any event, the three of them rolled off the step and onto the grass area in the front yard—once again with Deputy F. closest to the front door, Deputy A. closest to the street, and Tolliver in between the two deputies with his head closer to Deputy F. and his feet closer

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3 As of this point in time, Deputy F.'s testimony and Deputy A.'s testimony is not consistent as to Tolliver's aggressive actions or the deputies' physical response; and Tolliver did not testify. As we introduced, *ante*, we are reciting the evidence in a light most favorable to Tolliver, as set forth in Tolliver's appellate briefing. (*Woods*, *supra*, 241 Cal.App.4th at pp. 475, 476.) Significantly, as we explain at part III.A., *post*, up to and including the point in time when Deputy F. landed on the ground as he was attempting to secure Tolliver's right wrist, all of the evidence of the individuals' actions and reactions is consistent.

to Deputy A. Further ignoring the deputies' verbal commands, Tolliver continued to kick, thrash, struggle, and scream incoherently. In response, in their sustained effort to restrain Tolliver, the deputies continued to apply force—with Deputy F. landing knee strikes to the shoulder, and Deputy A. landing additional punches to the face.

Although Tolliver was handcuffed and face-down by the time the additional deputy sheriffs arrived, he was still uncooperative (ignoring verbal commands) and uncontrollable (kicking and thrashing). In the continued effort to restrain Tolliver, the reinforcements applied additional force, including closed fist strikes to his calf, and a cord cuff restraint to his legs.

Once the paramedics arrived, they gave Tolliver a sedative to control his excited delirium and transported him to the hospital. Tolliver suffered cuts to his lips and lower right jaw and a swollen left eye, and blood tests revealed that he was under the influence of methamphetamine. Deputy F. and Deputy A. suffered small cuts to their hands.

III. DISCUSSION

Tolliver raises three arguments on appeal: (1) appellate review of the *Pitchess* materials the trial court considered in camera is necessary; (2) Tolliver's trial counsel failed to provide reasonably effective assistance by not, as part of the *Pitchess* motion, requesting information on excessive force committed by Deputies F. and A.; and (3) based on the charge of resisting an executive officer with force and the evidence at trial, the trial court erred by failing to instruct the jury on the lesser included offense of assault.

We will consider the issues in reverse order and, as we explain, conclude first that, based on the evidence at trial, because the jury reasonably could not have found that Tolliver assaulted the deputy sheriffs but did not resist them with force, the court was not required to instruct the jury that assault was a lesser included offense of resisting an executive officer with force.

Based on that ruling, we then will explain that Tolliver was not prejudiced by his trial counsel's failure to have requested *Pitchess* information regarding excessive force.

Finally, in attempting to review the *Pitchess* materials the trial court considered in camera as Tolliver requested, the trial court did not actually review any of the materials produced by the Sheriff's Department's custodian of records. Thus, on that basis we will reverse the judgment and remand with directions that the court conduct the required in camera review under *Pitchess*. If the court determines *both* that the custodian of records had documents responsive to the allowable requests *and* that Tolliver was prejudiced by the failure to have had this discovery at the underlying trial, then the case shall proceed in due course. However, if the court determines *either* that the custodian of records does not have responsive documents *or* that, despite entitlement to the discovery, Tolliver suffered no prejudice by not having the discovery at the underlying trial, then the court shall reinstate the judgment. In either event, the court shall include in the record what it considered in chambers as part of its in camera review prior to deciding whether Tolliver is entitled to the requested discovery.

A. *The Trial Court Was Not Required to Instruct the Jury on Assault, as a Lesser Included Offense of Resisting an Executive Officer with Force*

In the present case, Tolliver contends that, under the accusatory pleading test, simple assault (§ 140) is a lesser included offense of resisting an executive officer with force (§ 69),[4] and that, because the evidence presented at trial would have supported convictions of both crimes (i.e., violations of both statutes), the trial court erred in not sua sponte instructing the jury on assault. We disagree.

In California, the jury may convict a defendant of any lesser offense, "the commission of which is necessarily included in that with which he is charged." (§ 1159.) As applicable here, " 'a lesser offense is necessarily included in a greater offense if . . . the facts actually alleged in the accusatory pleading[] include all the elements of the lesser offense, *such that the greater cannot be committed without also committing the lesser*.' " (*People v. Hicks* (2017) 4 Cal.5th 203, 208-209 (*Hicks*), italics added.) This

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4 Under section 69, subdivision (a), a person commits the crime of resisting an executive officer if the person *either* "attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law" *or* "knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty[.]" In count 1 of the information, the People charged Tolliver with violating *both* prongs of the statute—i.e., *both* (1) "unlawfully attempt[ing] by means of threats and violence to deter and prevent another who was then and there an executive officer from performing a duty imposed upon such officer by law," *and* (2) "knowingly resist[ing] by the use of force and violence said executive officer in the performance of his/her duty[.]"

Assault is defined at section 240 as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

The parties agree that section 240 is not a lesser included offense of the second prong of section 69, subdivision (a), but is *potentially* a lesser included offense of the first prong of section 69, subdivision (a). That is because section 240 and the first prong of section 69, subdivision (a), both require merely an *attempt to injure or resist*, whereas the second prong of section 69, subdivision (a), requires *actual injury or resistance*.

rule " 'encourag[es] the most accurate verdict permitted by the pleadings and the evidence[,]' " because it " 'ensures that the jury will be exposed to the full range of verdict options which . . . are presented in *the accusatory pleading itself* and are thus closely and openly connected to the case. In this context, the rule prevents either party, whether by design or inadvertence, from forcing an all-or-nothing choice between conviction of the stated offense on the one hand, or complete acquittal on the other. Hence, the rule encourages a verdict, within the charge chosen by the prosecution, that is neither "harsher [n]or more lenient than the evidence merits." ' " (*Id.* at p. 210.)

Because "*every*" lesser included offense that is supported by substantial evidence "must" be presented to the jury, "a trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 155, 162 (*Breverman*).) This sua sponte responsibility arises regardless of the wishes of trial counsel or the parties, whenever substantial evidence supports the lesser charge. (*Id.* at pp. 158, 162.) In this context, substantial evidence means " ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed." (*Breverman,* at p. 162; accord, *Hicks, supra,* 4 Cal.5th at p. 209.) Stated differently, a trial court need not instruct on a lesser included offense " 'when a defendant, if guilty at all, could only be guilty of the greater offense' "—i.e., " 'when the evidence, even construed most favorably to the defendant, would not support a finding of guilt of the lesser included offense but would support a finding of guilt of the offense charged.' " (*People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1367 (*Ortiz*).) In determining the

substantiality of evidence, a trial court is to consider only the "legal sufficiency" of the evidence, not its weight or the credibility of the witnesses who presented the evidence. (*Breverman*, at p. 177.)

On appeal, we independently review whether the trial court improperly failed to instruct on a lesser included offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 739.)

For purposes of this appeal, we accept the parties' agreement that, based on the charges in the information (as the accusatory pleading), simple assault (§ 240) is a lesser included offense of resisting an executive officer with force (§ 69) for purposes of Tolliver's actions. (See *Hicks*, *supra*, 4 Cal.5th at pp. 208-209 [a lesser offense is necessarily included in the greater offense "if . . . the facts actually alleged in the accusatory pleading[] include all the elements of the lesser offense"; fn. 4, *ante*].) Thus, if the record contains substantial evidence that Tolliver assaulted the deputies in his effort to prevent them from performing their duties but did not resist the deputies by the use of actual force, then the trial court was required to instruct the jury on assault. (*Hicks*, *supra*, 4 Cal.5th at p. 209; *Breverman*, *supra*, 19 Cal.4th at p. 162.) Alternatively, if the evidence, construed most favorably to Tolliver, *would not* support a finding of guilt of assaulting the deputies but *would* support a finding of guilt of forcefully resisting the deputies, then the trial court did not err. (*Ortiz*, *supra*, 208 Cal.App.4th at p. 1367; *People v. Stewart* (2000) 77 Cal.App.4th 785, 795-796.)

We accept Tolliver's argument that "[a] person who uses excess force or violence to resist arrest *in response to the officers' excess force* can be found guilty of the [lesser included offense] of assault and still be not guilty of the greater offense of resisting [an

executive officer] with violence." (Italics added, citing *People v. Brown* (2016) 245 Cal.App.4th 140, 154 (*Brown*).) That is because, consistent with CALCRIM Nos. 2652 and 2670, as the jury was instructed here: To convict a defendant of resisting an executive officer with force, in violation of section 69, subdivision (a), the People must prove that, at a time when the peace officers were acting lawfully, the defendant unlawfully used force to resist them; peace officers are not lawfully performing their duties if they were using unreasonable or excess force when attempting to make an otherwise lawful detention; if the peace officers used unreasonable or excess force when attempting to detain the defendant, he may lawfully use reasonable force to defend himself.[5] In his argument, and in particular, by relying on *Brown*, *supra*, 245

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5 In more detail, the jury was instructed: "To prove the defendant is guilty of [resisting an executive officer with force, in violation of section 69, subdivision (a)], the People must prove the following: One, the defendant unlawfully used force to resist an executive officer; two, *when the defendant acted, the officer was performing his lawful duty*; and, three, when the defendant acted, he knew the executive officer was performing his duty. [¶] . . . [¶]

"The duties of a deputy sheriff include responding to 911 calls and detaining people they suspect are under the influence of a controlled substance. A peace officer is not lawfully performing his duties if he is . . . *using unreasonable or excessive force in his duties*.

". . . [T]he People have the burden of proving beyond a reasonable doubt that Deputy F[.] and Deputy A[.] were lawfully performing their duties as peace officers. . . . [¶] . . . [¶] *A peace officer is not lawfully performing his duties if he is . . . using unreasonable or excessive force when making or attempting to make an otherwise lawful arrest or detention.* [¶] . . . [¶]

"Special rules control the use of force. A peace officer may use reasonable force to arrest or detain someone, prevent escape or overcome resistance or in self-defense. *If a person knows or reasonably should know that a peace officer is arresting or detaining him, the person must not use force or any weapon to resist an officer's use of reasonable force*. [¶] *If a peace officer uses unreasonable or excessive force while attempting to detain a person, that person may lawfully use reasonable force to defend himself. A*

Cal.App.4th 140, Tolliver suggests that, at the time he first resisted, the deputies were not lawfully performing their duties because of their use of unreasonable or excess force—in which event, he would be innocent of resisting an executive officer with force (§ 69, subd. (a)). If the jury also finds that Tolliver acted unlawfully (i.e., he used unreasonable force), then he would be guilty only of assault (§ 240); but, if the jury finds that Tolliver acted lawfully (i.e., he used only reasonable force), then he would be innocent of both crimes. Under these circumstances, according to Tolliver, the trial court was required to instruct the jury on assault, as a lesser included offense of resisting an executive officer with force.

However, unlike in *Brown*, *supra*, 245 Cal.App.4th 140, the record here does not contain substantial evidence to support a finding that Tolliver's force or violence was *in response to* unreasonable or excess force—i.e., an unlawful performance of their duties—by the officers. To the contrary, by the time the first officer exhibited what Tolliver contends is excess force—namely, the punches to his face by Deputy A.—Tolliver had already committed all of the acts necessary for the conviction on the greater offense of resisting an executive officer with violence.

Up to and including the time Deputy F. secured Tolliver's first (left) wrist in a handcuff, Deputies F. and A. were lawfully performing their duties in responding to a

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person being arrested or detained uses reasonable force when he, one, uses that degree of force that he actually believes is reasonably necessary to protect himself from the officer's use of unreasonable or excessive force; and, two, uses no more force than a reasonable person in the same situation that he believes is necessary for his or her own protection." (Italics added; see CALCRIM Nos. 2652, 2670.)

911 dispatch and in detaining a person who was acting erratically and whom they had good reason to believe was on a controlled substance. Deputy F. and Deputy A. were both dressed in their official tan and green Sheriff's uniform, including visible identity badges and department-issued weapons and tools of the job; and their marked black-and-white patrol vehicle, with overhead lights and a Sheriff's insignia on the side, was parked in front of the house. Outside of the house, on the front porch step, Deputy F. acted calmly, gently, and slowly as he explained to Tolliver who he and Deputy A. were and what they were doing there—namely, that they were there to help him and that, in doing so, they were going to detain him, not arrest him, by placing him in handcuffs so that the deputies could gather information in response to the 911 call. Deputy F. slowly circled behind Tolliver, locking his left wrist in a handcuff without incident. Then, with no warning, Tolliver made quick, sudden, and random movements that resulted in Deputy F. being thrown into the front door and onto the porch step—with Tolliver between Deputy F. and Deputy A., who was on the sidewalk or grass just off the step toward the street. *After* Deputy F. hit the front door and landed on the ground and while Deputy F. was holding onto Tolliver's cuffed left wrist and loose right arm, Tolliver began thrashing his body and kicking.

Thus, *as of this point in time*, there was substantial uncontradicted evidence to convict Tolliver of violating section 69, subdivision (a)—namely, evidence that Tolliver "knowingly resist[ed], by the use of force or violence, the officer, in the performance of his . . . duty." (§ 69, subd. (a).) Indeed, in his closing argument, the prosecutor relied on just these facts to convince the jury of the crime:

> "[Deputy F.] talked about calmly telling [Tolliver] he was going to detain him, they were there to help, walking around him and guiding his hands behind his back as opposed to hard on, you know, 'Get on the ground.[' ¶] That's the force that [Deputy F.] used to detain [Tolliver], okay, talking to him calmly and guiding his hand behind his back. There is absolutely nothing unreasonable about that, and that is the force that [Tolliver] reacted to. It was that guiding behind the back that he decided that he was going to thrust his body weight into that officer. We'll talk about the punches later on, but I want you to treat this kind of like as a movie, a still in a movie. *At this point right here . . . , all [Deputy F.] did was guide [Tolliver]'s hand behind his back when [Tolliver]decided to thrust his body weight into him. At that very moment a crime was committed*. It's over." (Italics added.)

Significantly, also as of this point in time—i.e., when the violation of section 69, subdivision (a), was complete—Tolliver does not contend there was any evidence (or any inference from evidence) that Tolliver "unlawful[ly] attempt[ed], coupled with a present ability, to commit a violent injury on the person of another" in violation of section 240.

Accordingly, Tolliver was not entitled to an instruction on the lesser included offense of simple assault, because, in the language of *Ortiz*, *supra*, 208 Cal.App.4th 1354, " 'the evidence [described two paragraphs above], even construed most favorably to [Tolliver], would not support a finding of guilt of [assault (§ 240)] but would support a finding of guilt of [resisting an executive officer with force (§ 69, subd. (a))].' " (*Ortiz*, at p. 1367.) Stated differently, because Tolliver could commit the greater offense (resisting an executive officer with force) without also committing the lesser offense (assault), the court was not required to instruct the jury on the lesser included offense of simple assault. (*Hicks*, *supra*, 4 Cal.5th at pp. 208-209; *Breverman*, *supra*, 19 Cal.4th at p. 162.)

Tolliver does not analyze the issue as the prosecutor did at trial (and as we have just done). Instead, in his appellate briefing, Tolliver describes "the defense side" case as: "a man high on drugs who calls 911 for help. At the sight of the deputies he submissively drops the phones that he used to make the calls, and sits down as an act of assent to [Deputy F.] who has chosen to cuff him rather than taking a lesser action.[6] In the process he knocks into [Deputy F.] in the small porch area resulting in [Deputy F.] sitting down as well. [Tolliver] winds up on top of [Deputy F.], possibly in his lap.[7] The rookie, [Deputy A.], overreacts to his 'worst fear' and violently attacks [Tolliver], punching him even after he is on the ground in handcuffs. [Tolliver] resists the violent attack by thrashing about, grabbing at the deputies and making kicking motions. In view of this, the deputies' use of force was unreasonable, and [Tolliver]'s actions were necessary for his protection." Tolliver then argues that, "[u]nder that scenario," he could not have been found guilty of resisting an officer with force (§ 69, subd. (a)), but still could have been found guilty of assault (§ 240).

The problem with Tolliver's "defense side" case is that the *uncontradicted evidence* at trial does not support Tolliver's "scenario"—notably, a "scenario" for which

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6 Although Tolliver criticizes Deputy F. for "[having] chosen to cuff [Tolliver] rather than taking a lesser action," Tolliver does not argue on appeal that the record contains substantial evidence that, in deciding to handcuff Tolliver, Deputy F. acted unlawfully.

7 In closing argument, defense counsel presented a much different description of the events once Deputy F. attached the first handcuff: "After that, yes, Mr. Tolliver squats, jumps up, pushes Deputy F[.] back into the door."

Tolliver has not provided record references. As we explain, the testimony from the only two trial witnesses, Deputy F. and Deputy A., does not support findings *either* that Tolliver sat down as an act of assent *or* that, as Tolliver was assentingly sitting down, he merely knocked into Deputy F., who also sat down, resulting in Tolliver on top of him.

According to Deputy F.: "I put the first handcuff on his left wrist and before I could apply the second handcuff to his right wrist, he suddenly dropped down his body weight into like a squatting position in front of me and started screaming, and he then popped up, jumping up and backwards, which threw me into the closed door directly behind myself."

According to Deputy A.: "[Deputy F.] got behind [Tolliver], advised him, 'I'm going to place some handcuffs on you,' and then [Deputy F.] advised [Tolliver] he was only detained. And . . . [Deputy F.] placed one handcuff on [Tolliver's] left wrist and then suddenly Mr. Tolliver sat down on the porch very quickly, very randomly. [¶] . . . [¶] Deputy F[.] continued to advise [Tolliver], 'Relax. We're here just to detain and we're here to get information.' [Deputy F.]'s like, 'Let me just put the other handcuff on,' and then suddenly Mr. Tolliver shoved Deputy F[.] [Tolliver] threw himself backward into Deputy F[.], knocking Deputy F[.] into the door and onto the ground."

For similar reasons—namely, a lack of evidentiary support in the record underlying this appeal—Tolliver's reliance on *Brown*, *supra*, 245 Cal.App.4th 140, is misplaced.

In *Brown*, the 67-year-old defendant was riding his bicycle unlawfully on the sidewalk while wearing earphones and without using a bicycle light at dusk. (*Brown*,

supra, 245 Cal.App.4th at p. 146.) A police officer yelled for the defendant to stop, but the defendant sped up, attempting to flee. (*Id.* at p. 146.) Another officer came to assist, and both officers pursued the defendant on foot; the officers cornered the defendant and, after a brief altercation, arrested him. (*Ibid.*) At this point, the parties' descriptions of the confrontation differed significantly. According to the officers, when the first of them caught up with the defendant, the officer yelled at the defendant to stop and tackled him to the ground—at which time, the defendant " 'aggressively' 'flipp[ed] back over' into a 'sitting position', and became combative, 'swinging his hands' with a 'clenched fist.' " (*Ibid.*) The officers responded with multiple " 'compliance strikes,' " which brought the defendant under control, allowing the officers to handcuff the defendant. (*Ibid.*) In contrast, according to the defendant, he never attempted to strike the officers; rather, he fell off of his bicycle after hitting a curb, and while he was facedown, without warning, one of the officers dove onto his back and, unprovoked, hit the defendant in the head three times. (*Brown*, at pp. 146-147.)

In *Brown's* appeal from a conviction for resisting an executive officer with force (§ 69, subd. (a)), the Court of Appeal ruled that the trial court committed reversible error by failing to instruct on the lesser included offense of simple assault. (*Brown*, *supra*, 245 Cal.App.4th at pp. 149, 153-154.) The appellate court reasoned that, *if the jury credited the defendant's version of the events*, they could have concluded that the officers used unreasonable or excessive force; and, *if the jury credited the officers' version of the events*, they also could have concluded that the defendant responded to the officers' use of excessive force with unreasonable force. (*Id.* at p. 154.) Thus, the jury could have

concluded *both* that the officers' use of force was excessive *and* that the defendant's use of force in response was unreasonable—which would have supported a conviction for assault (§ 240), but not for resisting an executive officer with force (§ 69, subd. (a))—thereby requiring an instruction on the lesser included offense of assault. (*Brown*, at p. 154.)

The determinative difference between *Brown* and the present case is that, in *Brown*, the defendant testified at trial as to all of the facts described above. (*Brown*, *supra*, 245 Cal.App.4th at pp. 146-147.) Thus, the jury in *Brown* was presented with *evidence* that, if credited, would have supported a conviction for assault, but not for resisting an executive officer with force. (*Id.* at p. 154.) In contrast, in the present case, the jury was presented with *uncontradicted evidence* of Tolliver's unreasonable use of force (which fully supports the conviction for resisting an executive officer with force (§ 69, subd. (a)) prior to any *evidence* of the officers' allegedly unreasonable use of force (which might have supported a conviction for assault (§ 240)).[8]

For the foregoing reasons, the trial court did not err in failing to instruct the jury on assault (§ 240) as a lesser included offense of resisting an executive officer with force (§ 69, subd. (a)).

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8 To the extent the officers' conduct *after* Tolliver's commission of the crime of resisting an executive officer with force may have included an unreasonable use of force—a finding on which we express no opinion—such use of force is not a defense to the completed crime.

B. *Tolliver Was Not Prejudiced by What He Contends Is His Trial Attorney's Ineffective Assistance of Counsel*

At the hearing on Tolliver's *Pitchess* motion, the trial court denied defense counsel's oral motion to amend the written motion to include discovery of "possible use of force or excessive force complaints against" Deputy F. or Deputy A. On appeal, Tolliver argues that his trial attorney failed to provide reasonably effective assistance of counsel by not, as part of the written *Pitchess* motion, requesting information on excessive force committed by the deputy sheriffs who detained Tolliver. As we explain, Tolliver has not met his burden of establishing reversible error.

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215 (*Ledesma*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 684 (*Strickland*).) This right entitles the defendant "not to some bare assistance but rather to *effective* assistance." (*Ledesma*, at p. 215; accord, *Strickland*, at p. 686.)

"In addition to showing that counsel's performance was deficient, a criminal defendant must also establish prejudice before he can obtain relief on an ineffective-assistance claim." (*Ledesma*, *supra*, 43 Cal.3d at p. 217; accord, *Strickland*, *supra*, 466 U.S. at p. 693.) Under this requirement, the defendant " 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " (*Ledesma*, at pp. 217-218, quoting *Strickland*, at p. 694.)

For purposes of this appeal, we will assume without deciding that by failing to include in his written *Pitchess* motion a request to discover evidence or complaints of unreasonable use of force by Deputy F. or Deputy A., Tolliver's trial attorney did not provide effective assistance of counsel. However, Tolliver is not entitled to relief on appeal, because he has not and cannot establish the requisite prejudice on the present record.

Tolliver acknowledges that, without knowing whether the requested discovery exists—i.e., whether evidence of complaints of the deputies' use of force exists—he cannot make the required showing that, had trial counsel requested this discovery, the result of the trial would have been different. Instead, Tolliver posits that "had the jury been aware of any prior act of excess force, it would have bolstered [his] trial argument that excess force was used against him."

The problem with this showing, *and any other potential showing on the present record,* is that—as we established at part III.A., *ante*—there is no evidence to support a finding that, prior to completion of the crime of resisting an executive officer with force, either Deputy F. or Deputy A. used excess force or was otherwise acting unlawfully for purposes of a potential defense to Tolliver's violation of section 69, subdivision (a). Thus, since there was *no evidence* of either deputy's unreasonable force in the present case, evidence of these deputies' use of excessive force in other cases would not have been admissible to "bolster[]" or otherwise establish or support a defense that the deputies used excess force in the present case—regardless of the extent of the evidence of complaints of these deputies' use of force contained in the Sheriff's files.

Thus, *even if* trial counsel had timely requested the *Pitchess* discovery related to complaints of the deputies' prior use of force, and *even if* the trial court had found and required the Sheriff to produce responsive documents, and *even if* the court had admitted those documents into evidence at trial, the result at trial would have been no different. Prior to the first action of either deputy that arguably might be considered unlawful due to an unreasonable or excess use of force, the prosecution proved each element of the crime—which includes each deputy's lawful performance of his duty. (§ 69, subd. (a); CALCRIM Nos. 2652, 2670; fn. 5, *ante*.) For this reason, Tolliver was not prejudiced by his trial attorney's failure to have requested *Pitchess* discovery related to complaints of excess force by either Deputy F. or Deputy A. (*Ledesma*, *supra*, 43 Cal.3d at pp. 217-218; *Strickland*, *supra*, 466 U.S. at p. 694.)

Accordingly, Tolliver did not meet his burden in this direct appeal of establishing the ineffective assistance of trial counsel.

C. *The Trial Court Erred During the* Pitchess *In Camera Proceedings*

During the appellate briefing, Tolliver moved to augment the record to include "transcripts of the [in camera] portion of the *Pitchess* hearing." The People did not oppose the motion. The court granted the motion, directing the superior court "to prepare and transmit, UNDER SEAL AND TO THIS COURT ONLY, a reporter's transcript of the in camera hearing conducted on November 3, 2017, pursuant to *Pitchess*[.]" The record on appeal was, accordingly, augmented on September 25, 2018, prior to the filing of Tolliver's opening brief, and consists of one sealed 13-page reporter's transcript of the November 3, 2017 in camera proceedings.

In his opening brief on appeal, Tolliver asks this court to review *the materials* the trial court reviewed in camera to determine whether the court abused its discretion in ruling that none of the documents produced by the Sheriff's custodian of record was responsive to the discovery requests the court had determined were appropriate. The People do not oppose this request.

However, the record on appeal does not contain the materials (or a copy of the materials) that the trial court reviewed, and the trial court's minutes do not indicate that the court retained what was produced (or a copy of what was produced). In our effort to determine whether the reporter's transcript of the in camera proceedings nonetheless provided a sufficient record for appellate review by "stat[ing] for the record what documents [the trial court] examined"—a potentially acceptable alternative under *People v. Mooc* (2001) 26 Cal.4th 1216, 1229 (*Mooc*)—we learned that, in fact, the trial court never reviewed any of the documents the custodian of records brought to the hearing.[9]

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[9] At the in camera proceedings, the trial court placed the custodian of records under oath. The custodian testified that he had been present during the public session of the *Pitchess* hearing and understood that the court had found good cause for producing "any evidence or complaints of false statements and reports or dishonesty with respect to the two deputies, Deputy [F.] and Deputy [A.]" At the court's suggestion, the Sheriff's attorney asked the custodian questions about the contents of the records the custodian produced. The court also questioned the custodian. The custodian provided detailed descriptions of the contents of each of the files produced; and, as to each file, the custodian stated that he had reviewed its contents and answered "No" to counsel's question whether it contained anything responsive to the trial court's finding of good cause for production. At the conclusion of the questioning as to the records relating to each deputy, the court answered "No" to counsel's question whether it wanted to review the files that the custodian brought to the hearing.

By relying exclusively on the custodian's determination as to whether the records were discoverable—i.e., by not physically reviewing the records produced by the custodian—the trial court erred, since "a trial court conducting an in camera review of peace officer personnel records [under *Pitchess*] must examine the produced records itself and may not rely on the custodian's assessment of the discoverability of information contained in the records." (*Sisson v. Superior Court* (2013) 216 Cal.App.4th 24, 28-29; accord, *Mooc*, *supra*, 26 Cal.4th at p. 1227 ["both *Pitchess* and the statutory scheme codifying *Pitchess* require the intervention of a neutral trial judge, *who examines the personnel records in camera*, away from the eyes of either party" (italics added)].)

Fortunately, we have the benefit of well-established guidance on the best remedy in this situation:

> " ' "[W]hen the validity of a conviction depends solely on an unresolved or improperly resolved factual issue which is distinct from issues submitted to the jury, such an issue can be determined at a separate post-judgment hearing and if at such hearing the issue is resolved in favor of the People, the conviction may stand." [Citation.] In other words, "when the trial is free of prejudicial error and the appeal prevails on a challenge which establishes only the existence of an unresolved question which may or may not vitiate the judgment, appellate courts have, in several instances, directed the trial court to take evidence, resolve the pending question, and take further proceedings giving effect to the determination thus made." ' " (*People v. Gaines* (2009) 46 Cal.4th 172, 180.)

In *Gaines*, where the trial court erroneously rejected a showing of good cause for the *Pitchess* discovery and, therefore, had not reviewed the requested records, our Supreme Court concluded that "the proper remedy . . . is not outright reversal, but a conditional reversal with directions to review the requested documents in chambers on remand."

(*Ibid.*; see § 1260 [appellate court "may, if proper, remand the cause to the trial court for such further proceedings as may be just under the circumstances"].) Indeed, *Gaines* directs that where, as here, "a trial court has failed to review the *Pitchess* documents at all, it is appropriate to remand the case to permit the trial court to review the requested documents in chambers and to issue a discovery order, if warranted" (*Gaines*, at pp. 180-181);[10] and we shall do so here.

IV. DISPOSITION

The judgment is reversed and the matter is remanded with directions that, consistent with *Pitchess*, *supra*, 11 Cal.3d 531, and this opinion, the trial court conduct a new in camera review of the documents previously produced by the custodian of records of the Sheriff's Department. If, following the in camera review, the trial court determines that discoverable information exists and should be disclosed, then the court must order disclosure, allow Tolliver an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability that the outcome would have been different had the discoverable information been disclosed to Tolliver prior to the underlying trial. If the court's in camera inspection on remand reveals no discoverable information (or the existence of discoverable information, but no prejudice from the prior denial of the discovery), then the court shall reinstate the judgment as of its original date.

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10 The parties agree.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

DATO, J.